IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No.1586 of 1980
**

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5 : NO

SHAH KANAIYALAL NAGARDAS .. Petitioner

Versus

JOSHI JANAKRAI SHANKERLAL .. Respondent

Appearance:
MR JJ SHAH for Petitioner
MR JD AJMERA for Respondent

CORAM : MR.JUSTICE H.R.SHELAT
Date of decision: 25/03/98

ORAL JUDGEMENT :

The petitioner, who is the original plaintiff filed a suit to recover the amount of rent and possession of Block No.24 in Fulchandnagar Cooperative Housing Society at Dudrej village, 3 KMs away from Surendranagar. He succeeded in obtaining the decree on 28.2.1978. The respondent then preferred Regular Civil Appeal No.41 of

1978, wherein on 26.3.1980, the possessory relief came to be refused. The petitioner has, therefore, challenged the legality and validity of the judgment and decree passed by the appellate court preferring this Revision Application.

2. In order to appreciate the rival contentions necessary facts may be stated. The petitioner-original plaintiff is the owner of a house known as Block No.24 in Fulchandnagar Cooperative Housing Society situated within the local limits of village Dudrej, about 3 KMs away from Surendranagar (hereinafter referred to as "the suit premises). The petitioner let the suit premises to the respondent (original defendant) at the monthly rent of Rs.45/-. The period of monthly tenancy commenced on the first day of the month and ended with the last day of the month under Gregorian calendar. As per the terms and conditions of the lease, the respondent had to make payment of rent every month regularly. He used to make payment of rent to the wife of the petitioner as the petitioner was serving at Jamnagar. For the month of October 1973, the respondent did not pay rent. But thereafter he paid rent qua other months, but not for October 1973. Thereafter from 1.8.1974 he did not pay the rent and continued to avoid payment of rent upto 31.1.1975. He was thus, in arrears of rent for 7 months, inclusive of October 1973. An amount of Rs.350/- was, therefore, due but the respondent was without any cause avoiding to make payment though requested often. With no option, therefore, the petitioner on 4.2.1975 gave a notice calling upon the respondent to pay the amount of rent that had become due and vacate the suit premises. The notice was served on 6.2.1975 on the respondent. He after service of notice neither paid the amount of rent nor vacated the suit premises. The petitioner then filed Regular Civil Suit No.54 of 1975 in the Court of the Civil Judge (Senior Divison), Surendranagar to recover the possession of the suit premises and Rs.360/-, the amount of rent; Rs.45/-, the amount for use and occupation; and Rs.50/- towards notice charges; in all, Rs.420/- together with cost of the suit.

3. After receiving the summons, the respondent appeared before the trial court and filed his written statements denying the case alleged against him. He contended that the rent being charged was cumbersome. Standard rent was required to be fixed. Formally the rent of the suit premises was Rs.20/- per month. He was ready and willing to pay the amount of rent at that rate. Whenever, he made payment the petitioner was issuing kutcha receipts, but was not giving receipts in the

prescribed form. In fact, nothing was due and there was no reason to terminate his tenancy. He urged to dismiss the suit.

4. Then the learned Joint Civil Judge, Senior Division, Surendranagar to whom the suit was assigned for hearing and disposal in accordance with law, framed necessary issues at exhibit 22. He held that the respondent was in arrears of rent for a period of six months; the notice given was legal and valid. Rs.420/were due and the petitioner was entitled to recover the possession of the suit premises. He, therefore, passed decree as prayed for on 28.2.1978, in favour of the petitioner.

5. Being aggrieved by such judgment and decree the respondent preferred Regular Civil Appeal No.41 of 1978 in the District Court at Surendranagar. The appeal was then assigned to the then learned Assistant Judge at Surendranagar for hearing and disposal in accordance with law. He found that the learned Joint Civil Judge, Senior Division had fallen into errors while appreciating the evidence on record and drawing the conclusions favourable to the petitioner. In fact, the rent for the month of October 1973 was not due, but the rent from 1.8.1974 was due, and on the date of the suit the respondent being in arrears of rent for eight months the petitioner was entitled to Rs.360/- only and not Rs.420/-. He also found that on the date of the notice the respondent was not in arrears of rent for more than six months and was not negligent in making payment of rent within one month of the service of the notice. With the result, he held that the petitioner was not entitled to the possession of the suit premises. He, therefore, allowed the appeal, set aside the judgment and decree passed by the trial court and ordered that the petitioner was entitled to Rs.360/- only which were to be adjusted towards the deposit made during the pendency of the suit. It is against that judgment and decree the present Revision Application has been filed.

6. So far as the judgment and decree of the lower appellate court is concerned it is submitted that evidence on record is not properly considered keeping the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "Bombay Rent Act") in mind. The rent for the month of October 1973 was not paid. But the learned appellate Judge misdirected himself while appreciating the evidence and reached erroneous finding thereof. On the date of the notice the respondent was in arrears of rent for more

than six months and within a month after service of the notice neither dispute of standard rent was raised nor the amounts claimed were tendered. The petitioner was, therefore, entitled to have decree of eviction on the ground of non payment of rent, but unfortunately the learned appellate court erroneously held otherwise. Mainly, the learned Assistant Judge disbelieved the case of the petitioner on the grounds, namely,

(i) non issuance of receipt in the prescribed form,

(ii) non examination of the rent Collector,

(iii) late production of the diary, and

(iv) subsequent conduct in not claiming rent for October 1973.

7. Learned advocate representing the respondent has submitted that only on the ground of non payment of rent the suit was filed to recover the possession of the suit premises. When the amounts were tendered by sending Money Order, which was refused by the petitioner, the learned Assistant Judge was perfectly right in interfering with the judgment and decree passed by the trial court. In fact, the learned Assistant Judge has discussed the law and facts as well and reached the only possible logical conclusions. The judgment of the learned Assistant Judge being quite in consonance with law, no interference is warranted.

8. It may be mentioned that the facts that the respondent hired the suit premises at the monthly rent of Rs.45/- inclusive of all taxes and charges, rent from 1.10.1974 has remained unpaid and the notice dated 4.2.1975 given by the petitioner was delivered to the respondent on 6.2.1975 are undisputed. The eviction is sought by the landlord only on the ground of non payment of rent. Section 12 of the Bombay Rent Act is the relevant provision to be borne in mind, when on the ground of non payment of rent the decree of eviction is sought for. So long as the tenant pays the standard rent or he is ready and willing to pay the standard rent and the permitted increases, if any, and observes and performs other conditions of the tenancy, the landlord is not entitled to recover possession of the premises he has let. But if the tenant fails to make payment of rent, the landlord is entitled to the possession of the

premises he has let provided required conditions of the section are satisfied. Before I proceed to dissect the merits of the rival cases the law which has been made clear by several pronouncements of this Court as well as the Apex Court may be stated.

9. If the tenancy is monthly, the rent is payable by month, on the date of the notice demanding the rent, the tenant is in arrears of rent for six months, or more, and there is no bonafide dispute about the standard rent and permitted increases, or the same is not bonafide raised within one month after the receipt of notice, Sec.12(3)(a) of the Bombay Rent Act will apply; and in other cases, Sec.12(3)(b) will apply. If Sec.12(3)(a) is applicable, the tenant, in order to establish his ready and willingness to pay the rent, has to tender all the then dues within one month after the receipt of notice; and if he neglects to tender accordingly, he will be deemed to be the tenant, not ready and willing to pay the rent. In that case, he will lose the protection, and court will have no option, but to pass the decree of eviction against him. When Sec.12(3)(b) applies, the tenant, in order to show his ready and willingness to pay the rent, has to tender, as per the standard rent, all the amounts of rent then due on the first day of hearing, and should then go on paying/ depositing in court, the rent every month regularly as and when it falls due, till the final decision in the suit, and if appeal is preferred, till the final disposal of the appeal, provided of course, there is no banafide dispute about the standard rent, and permitted increases; or if there is such dispute, it is set at rest finally before the date of first hearing, i.e. date of issue in Regular Suit, not triable in summary way, i.e. small cause way, and if there is a bonafide dispute about standard rent, and is not set at rest finally before the first day of hearing, and the court determines the same later on, the duty of the court is to fix the date after determining the standard rent for depositing or tendering the rent that has become due till then as per the standard rent fixed, and the tenant has to deposit in Court, at the rate of standard rent fixed, all the then dues on or before the date fixed by the court, and should then go on paying or depositing in court, the rent every month regularly till the suit is finally disposed of. If in appeal, the appellate court revises the standard rent and enhances the rate of rent, the tenant has to pay all the then differences on or before such date fixed by the appellate court, and should then go on depositing the rent every month regularly till the appeal is finally disposed of. The tenant is duty bound to pay the amount

of costs only, if specifically ordered by the Court. If the tenant, without any good cause commits a single default in making payment accordingly, the requirements of Sec.12(3)(b) cannot be said to have been fulfilled, and in that case, the court has no option, but to pass the decree of eviction, holding the tenant to be the tenant not ready and willing to pay the rent. If the trial court prefers to determine standard rent, not before the first date of hearing, but subsequently at any stage or along with other issues; and after determining the standard rent, it does not grant reasonable opportunity to the tenant to pay the rent that has become due, fixing the date for payments, and disposes of the suit, delivering judgment, giving findings on all issues, it will be the material irregularity and illegality; and in that case, it becomes the duty of the appellate court to fix the date, and thereby, grant reasonable opportunity to the tenant to deposit all the dues and then go on depositing regularly every month till the appeal is finally disposed of. In such case also, if a single default is committed by the tenant, he can be held to be the tenant, not ready and willing to pay rent, and can be held to have lost the protection of law. For some time in past, there was controversy about the meaning of the word "regularly" but it was then set at rest by the Supreme Court in the case of Mrunalini B. Shah and another v. Bapalal M. Shah, (1978) XIX GLR 1090. It is held that "regularly" means reasonable punctuality, but not clock-wise. It must conform with substantial proximity to the sequence of time or intervals at which the rent falls due. If the rent is payable by month, the tenant must tender the rent every month, or as it falls due, or at his discretion in advance. In short, tenant should pay the rent before the next months's rent becomes due. But this was the position prior to the amendment made in Sec.12(3)(b). Vide Gujarat Amendment Ordinance, 1984, the Govt. of Gujarat amended Sec.12(3)(b) of the Bombay Rent Act whereby the words "and therefore", "regular", and "also" are deleted. Now, Sec.12(3)(b) runs as follows :

> ... (b) In any other case, no decree for eviction shall be passed in any such suit, if on the first day of hearing of the suit, or on or before such other date, as the court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due; and thereafter continues to pay or tenders in court permitted increases to pay or tenders in court permitted increases till the suit is finally decided and pays costs of the suit, as directed by the court

..."

In view of such amended Sec.12(3)(b) and the decision in Mrunalini Shah's case (supra), the tenant, in order to establish his ready and willingness to pay the rent, has to pay up all the then dues on the date of issues, provided, of course, there is no dispute about the standard rent, or that dispute has been set at rest, prior to framing of the issues, and should then go on paying the rent till the suit is finally decided. When the word 'regularly' is deleted, and the words 'continues to pay' are substituted in the Section, in my view, the word 'continue' connotes to go on paying the rent, unbrokenly, i.e. without interruption. However, if there are few, negligible, not alarming, defaults in making the payment, the same may not come in the way of the tenant. But the defaults in sequence, or in piecemeal, indicating neglect to pay, or avoidance to pay or mischievous omission to pay, or failure to pay rousing the landlord to go to war, or causing the landlord to pull a long face, or the defaults exhausting landlord's endurance, will regardless of the numbers of defaults, show that the tenant is not ready and willing to pay rent even under Sec.12(3)(b), and in that case the court will have no option but to pass the decree of eviction. Of course the court will be under the obligation to give time to the tenant to make the payment, provided the dispute about standard rent is raised and the same is not set at rest either before the issues are framed or subsequent to it, and later on while disposing of the suit the same is determined. It may be stated that in view of the decision of the Apex Court in Ansuyaben K. Bhatt vs. Rashiklal M. Shah and another, (1997) 5 SCC 457, the concept of wilful defualt does not apply to action under the Bombay Rent Act. It is also held in N.S.M. Ahmed Jamalia Beevi vs. D.N. Shah, (1997) 6 SCC 597, that it is the bounden duty of the tenant to pay rent to the landlord regularly and not to commit default. When there is persistent default, time to pay rent should not be granted as sympathetic consideration for the default cannot be accepted. The principle made clear can safely be applied to the relevant provision of the Bombay Rent Act.

10. It may be mentioned that according to the petitioner on the day when notice was issued, the respondent was in arrears of rent for seven months and while stating the case in details he has made it clear that for the month of October 1973, the respondent for one or the other reason did not pay the rent but prior to it and subsequent to it, he paid the amount of rent.

Thereafter, from 1.8.1974 to 31.1.1975, no rent was paid and thus, in all, the respondent was in arrears of rent for a period of seven months. He, therefore, on 4.2.1975 issued notice. The respondent refutes the case so far as non payment of rent for the month of October 1973 is concerned. The learned Assistant Judge has elaborately discussed the rival contentions about payment and non payment of rent for the month of October 1973. I am in general agreement with his reasonings. Therefore, it is not necessary to restate the same. Looking to the evidence on record and on the basis of the reasonings of the learned Assistant Judge, it is clear that the case of non payment of rent for the month of October 1973 alleged by the petitioner gains no ground to stand upon. Notice, exhibit 28, dated 4.2.1975 was given to the respondent wherein the rent from 1.8.1974 to 31.1.1975 is claimed mentioning that the respondent had not made payment thereof and rent for the month of October 1973 is also claimed. The respondent did not give reply to such notice. His silence is the circumstance on record going to discredit the truth of his case. Further according to him he used to prepare receipts in his own hand writing and take the same to the wife of the petitioner for getting her signature. The wife of the petitioner used to sign the same against payment of rent made. No such receipt is also produced by the respondent to show that he made payment for the said period. It may be mentioned that the petitioner has, filing the suit, demanded the rent- amount alleging that rent for a particular period was not paid. He has, therefore, not to prove the negative aspect of the fact by leading any further evidence except denying the case. If the tenant asserts the payment of a particular period the burden is on him to prove to the satisfaction of the claim made by the other side. In this case, therefore, the respondent ought to have produced the receipt he was preparing and taking signature of the petitioner's wife, if at all he made payment for any of the aforesaid six months from 1.8.1994 to 31.1.1975. No such receipt is produced and no other evidence establishing payment of rent having been made is led. The petitioner on oath has stated that the rent for the aforesaid six months is not paid. His such statement on oath inspires confidence leaving no room to doubt. The case of non payment of rent must, therefore, find favour. The notice was given on 4.2.1975. It was served on respondent no.6.2.1975. On the date of the notice, therefore, the respondent was in arrears of rent for six months, though he might not be in arrears of rent for more than six months as the case of non payment of rent for October 1973 is rightly turned down by the learned Assistant Judge. Which of the

section 12(3)(a) or 12(3)(b) is applicable has now to be examined keeping above stated position of law in mind.

11. In this case, no doubt, dispute about standard rent is raised by the respondent, but the same is raised in the written statement after he was served with the summons and appeared before the Court. He has not raised dispute within one month after the service of the notice. He has, therefore, failed to avoid the operation of section 12(3)(a) of the Bombay Rent Act.

12. Whether the respondent tendered the amount of rent within one month after the service of the notice is the next question that is required to be examined. On 6.2.1975, he was served with the notice. While computing the period of one month, the day on which the notice was served has to be excluded. Accordingly, if the period of one month is reckoned the same would be over on 6.3.1975. In this case, therefore, the respondent was required to make payment of rent demanded in the notice, latest by 6.3.1975, instead that he tendered Money Order form on 7.3.1975, along with the amount of Rs.270/- to the Post Office for delivering the same to the petitioner. The Postman tendered the Money Order on 8.3.1975, but as per the Money Order coupon, exhibit 44, the same was refused by the petitioner. From these dates, and facts it follows that the respondent failed to tender the amount of rent due within one month after receipt of the notice.

13. The question is raised whose agent the Post Office would be? A similar question under the Contract Act arose before the Apex Court in the case of Commissioner of Income Tax, Bombay South, Bombay v. Messrs Ogale Glass Works Ltd., Ogale Wadi, AIR 1954 SC 429, wherein it is held that the Post Office will be the agent of the addressee, if at the request of the addressee a delivery to the Post Office is made. In that case by tendering Money Order form and amount pursuant to the request of the addressee (creditor), the sender can be said to have performed his obligation in the manner prescribed and sanctioned by the creditor, and thereby it would amount to discharging the contract by such performance. What is, therefore, made clear by the Apex Court is that if at the request of the addressee, the Money Order form along with amount are tendered and delivered to the Post Office, the Post Office being in that case agent of the addressee, the tender will be deemed to have been made on the day the Post Office receives Money Order form and amount. Again, a similar question arose before the Apex Court in The Indore Malwa

United Mills Ltd. v. The Commissioner of Income Tax (Central), Bombay, AIR 1966 SC 1466, wherein also it is laid down that if by an agreement, express or implied, by the creditor, the debtor is authorised to pay the debt by a cheque and to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque, and the creditor can be said to have received the payment as soon as the cheque is posted to him. What is, therefore, clear is that if by express or implied agreement, the payment is made to the Post Office, it would amount to payment to the addressee. But in absence of such contract, payment to the addressee can be said to have been made on the day, when the Postman goes to the addressee and tenders the same, and not on the day the sender to the Post Office tenders the form along with the amount.

14. In this case, there is no iota of evidence about the agreement between the parties to remit the amount of rent through the Post Office. In this regard nothing is clearly and specifically stated in the notice, on the contrary in clear words the petitioner asked the respondent to go to him and pay the rent in person by using wrods in Gujarati, "Aapi jaso" ( ) i.e. come and pay. This shows that the petitioner never proposed or requested or consented to send by Money Order. Admittedly, as per the practice in past, the respondent used to go to the petitioner or his wife in person with ready receipt and pay rent. There was, therefore, no agreement permitting either expressly or impliedly to send the sum of rent through Post Office, i.e. by M.O. In absence of such contract, in this case, the Post Office did not become the agent of the petitioner and hence the tender of rent can be said to have been made on 8.3.1975, when the Postman went to the petitioner and the petitioner refused to accept the same and not on the day when respondent tendered the M.O. form in Post Office. By that time the period of one month after service of notice had already expired, as stated hereinabove. The tender of rent due in this case is, therefore, made after the expiry of a period of one month from the service of the notice.

15. From the above discussed facts, it is clear that in this case the tenancy is monthly, the rent was made payable every month, the respondent on the date of notice was in arrears of rent for six month, he did not bonafide raise the dispute about standard rent within one month of the service of notice, and neglected to make the payment within one month of the notice. It, therefore, follows that in this case when all the requirements of section

12(3)(a) of the Bombay Rent Act are satisfied by the petitioner, the said provision comes into play. The respondent has failed to discharge his obligation under section 12(3)(a) and hence with no option the decree of eviction has to be passed. The learned Assistant Judge has overlooked above stated facts and law. His appreciation of evidence is, therefore, erroneous.

16. At this stage, Shri Ajmera, learned counsel representing the respondent contends that if there is a delay of a day or two in tendering the amount as has happened in this case, should not be viewed with disfavour, because substantial compliance would be sufficient to protect the tenant from being evicted. The Contention cannot be accepted. Section 12(3)(a) when read with meticulous care, it admits no possibility for substantial compliance, if the rent is tendered late by a day or two. The word 'shall' appearing therein mandates that the provision has to be strictly interpreted and not to unduly favour one or another party. If the intention of the legislature was to grant any concession or allowance or indulgence in favour of defaulting tenant it would have used the word "may" instead of the word "shall" in the section. A perusal of section 12(3)(a), therefore, reveals the intention of the legislature that if the conditions thereof are satisfied the landlord acquires a right to have possession of the premises and that right cannot be damaged or frustrated by any logic or by interpretation foreign to law amounting to giving unjust concession or showing undue sympathy to the tenant and conniving his default. If the legislature wanted to give more time than six months, it could have fixed longer period than six months or could have vested discretion in Court couching the section in appropriate words. It may be noted what the Apex Court has recently in the case of Malpe Vishwanath Acharya vs. State of Maharashtra, (1998) 2 SCC 1, has while commenting made it clear about the Rent Legislation that Rent Legilsation should be in the larger interest of the society as a whole and should not confer any disproportionately larger benefit to one class, viz. tenants to the disadvantage of the other class, viz. landlords. It should be just to both by striking a balance between the rival interests of the two. The law has to be examined from the perspective of Article 14 to ascertain whether with the passage of time it has become arbitrary and unreasonable or not. The provisions of the Bombay Rent Act are to be interpreted and construed strictly; and not assuming the meaning or object or intention foreign to it becoming sympathetic towards one of the classes breeding dictatorship of that particular class and throwing other

class to miseries, woes and helplessness. In short, interpretation or contention unjustly favouring the defaulting party is deprecated. The interpretation must be meaningful and promoting the object of the Act and not ideology of one or the other. In the light of such law, my above interpretation finds support. The contention advanced running counter to the just interpretation of section 12 (3)(a) and object of the Bombay Rent Act as well as intention of the legislature, therefore, cannot be accepted. If contention is accepted it would amount to misreading the provision and framing a new law embarking upon the realm of the legislature for showing unjust favour to the tenant.

17. The Rent is due from 1.8.1974, while the suit is filed on 1.4.1975. Hence on the date of the suit, the respondent was in arrears of rent for a period of eight months. The rate of monthly rent is Rs.45/-. At such rate, the total dues for eight months come to Rs.360/-. The learned trial court Judge was, therefore, not right in passing the decree for Rs.420/-, while the learned Assistant Judge has rightly passed decree for Rs.360/-.

18. It may be stated that the Revisional Jurisdiction of the Court is not as wider as appellate jurisdiction is. The scope of inquiry in Revision is limited. The Revisional Jurisdiction is to be exercised only for the purpose of satisfying that the decision of the lower court is in accordance with law. If there is miscarriage of justice owing to the error of law, this Court can interfere with the decision of the lower court. This Court cannot reassess the evidence and interfere with the findings of fact for even if on the question of fact this court is of a different view cannot substitute its view holding that the same is better than the view of the lower court. Looking to my such limited scope of inquiry I have with meticulous care and finicky details considered rival contentions and on the basis of whatever is discussed hereinabove it becomes clear that the learned Assistant Judge fell into errors of above stated law and appreciating the evidence against sound principles of law and overlooking the position of law applicable, as well as misinterpreting the provisions of law, passed erroneous judgement and decree. This is, therefore, a fit case where interference of this Court in Revision is warranted.

19. For the aforesaid reasons, the judgment and decree passed by the learned Assistant Judge at Surendranagar, so far as it relates to the possessory relief is required to be set aside as the petitioner is

entitled to peaceful and vacant possession of the suit premises on the ground of non payment of rent. In the result, this Revision Application is partly allowed. The judgment and decree passed by the learned Assistant Judge at Surendranagar are set aside so far as the same relate to possessory relief and mesne profit; and the decree in that regard passed by the trial court is restored. So far as the judgment and decree relating to the recovery of rent amounting to Rs.360/- is concerned are hereby maintained.

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